83-1207

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

LOU RAINES RIFFE, Administratrix
of the Estate of Don C. Riffe,
Petitioner,
v.

INTERNATIONAL HARVESTER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED FOR REVIEW

Does a state appellate court's reversal of a jury verdict in favor of the plaintiff constitute a denial of due process where the court arbitrarily and capriciously ignores, reweighs, and discounts evidence presented by the plaintiff at trial?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe - Petitioner
2. The Estate of Don C. Riffe
3. International Harvester Company - Respondent
4. Peter Cave Coal Company
5. Wolfe Creek Collieries

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OPINIONS BELOW

The Order Denying Motions for Discretionary Review of the Kentucky Supreme Court was entered on October 26, 1983. The text of said order is set out in the Appendix at A 3 to A 4. The opinion of the Kentucky Court of Appeals is reported as *International Harvester Company v. Lou Raines Riffe, et. al.*, No. 82-CA-403-MR (June 3, 1983). The text of said opinion and order thereon are set out in the Appendix at A 5 to A 8.

JURISDICTION

The order of the Kentucky Supreme Court denying petitioner's Motion for Discretionary Review was entered on October 26, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests upon the due process clause of the fourteenth amendment to the United States Constitution, which provides that:

> No state shall . . . deprive
> any person of life, liberty,
> or property without due process
> of law . . . .

While not at issue on this appeal, Kentucky Revised Statutes Sec. 411.310(2) will be referred to and discussed herein. The text of that statute is set out in the Appendix at A19.

STATEMENT OF THE CASE

This appeal arises from a products liability lawsuit brought by petitioner Lou Raines Riffe, as the administratix of her deceased husband's estate, against International Harvester Company.[1] The action was filed in a Kentucky Circuit Court after petitioner's husband was fatally injured while operating a front-end loader manufactured by International Harvester (hereinafter "Harvester"). Petitioner alleged that her husband's death was proximately caused by Harvester's failure to include a rollover protection structure (ROPS) in the design of the front-end loader; thereby rendering the actual design defective.

[1]Two other defendants were also named in this action. After a jury verdict against all three defendants, two failed to perfect their appeals in state court. Accordingly, they are not involved in this appeal.

At trial Petitioner presented evidence that her husband would have survived the accident had the front-end loader been equipped with ROPS. Harvester's own expert admitted that at the time the loader was manufactured it was generally known throughout the industry that ROPS were available. Petitioner also presented the following evidence concerning the defective nature of Harvester's design:

1. At and before the time the loader was manufactured at least ten auxiliary equipment manufacturers were producing ROPS units for such equipment;
2. Prior to the date of manufacture, Harvester itself had purchased auxiliary ROPS units, incorporated them into front-end loaders, and sold the integrated unit as a harvester product;
3. Prior to the date of manufacture there were some

thirty-three regulations requiring ROPS on front-end loaders, including regulations imposed by the state of California, the United States Army Corps of Engineers, and the United States Bureau of Reclamation.

4. Harvester recognized the need for such roll-over protection in the early 1960's and field tested ROPS units substantially prior to the date of manufacture.

The trial court instructed the jury that they were to find for Petitioner and against Harvester if they concluded that the front-end loader was defectively designed and unreasonably dangerous to the user and if such design defect was a substantial factor in causing the death of Petitioner's husband. The jury returned a verdict in favor of Petitioner, awarding her approximately $2.1

million.[2]

Harvester appealed to the Kentucky Court of Appeals contending, inter alia, that the trial court erred in failing to grant its motion for a directed verdict. The Court of Appeals agreed and entered an order directing the circuit court to dismiss the claim against Harvester. The Court of Appeals based its decision on Kentucky Revised Statutes Sec. 411.310(2), which creates a presumption in favor of a manufacturer in a products liability case if the design at issue conformed either to industry standards or the state of the art existing at the time the product was designed and manufactured.

The Court of Appeals concluded that Harvester's evidence established conformity with industry standards

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[2] The jury concluded that 60% of the damages were attributable to Harvester. The remaining damages were assessed against the two additional defendants discussed supra at n.1.

and that Petitioner's evidence was insufficient to rebut the statutory presumption. In so doing, however, the court either discounted or ignored much of the evidence presented by Petitioner as to the safety of Harvester's design, the existence of industry standards mandating use of ROPS units, and the state of the art at the time the loader in question was manufactured. The court characterized Petitioner's evidence as "general" and conclusory. The court also discounted the testimony of one of Petitioner's expert witnesses apparently because he had testified in another case in which a verdict had been directed for the defendant.

In response to the Court of Appeals' decision Petitioner filed a motion for discretionary review with the Kentucky Supreme Court. The text of the relevant portions of said motion is set out in the Appendix at A 47 to

A 55. In the motion Petitioner pointed out that the Court of Appeals had virtually ignored Petitioner's evidence and had substituted its opinion for the jury's findings of fact. Petitioner's argument clearly raised the contention that the Court of Appeals' action constituted a denial of Petitioner's due process rights. This issue could not have been raised prior to the filing of said motion.

On October 26, 1983, the Supreme Court of Kentucky entered an order declining to review the Court of Appeals decision and ordering that said decision not be published.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals' decision was the first such decision involving Kentucky Revised Statutes 411.310(2), a provision which significantly affects all products liability actions in Kentucky. The court reversed a $2.1 million judgement on the basis of its selective reading of the evidence adduced at trial and its arbitrary determination as to the weight certain testimony should be given. The court's decision is an invitation to other appellate courts to ignore the conclusions of the finder of fact in such cases and arrive at their own conclusions based upon a "cold record." Such arbitrary and unreasonable action constitutes a denial of due process.

This Court currently has before it *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246, in

which one of the issues presented is whether a federal appellate court can deprive a party of compensatory damages by ignoring determinations of credibility made by the trial court. Petitioner submits that this case presents similar issues of equal importance to state court litigants.

This Court recently reaffirmed that a cause of action is a species of property protected by the fourteenth amendment's due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *see also, Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Similarly, rights acquired by a judgment and choses in action based upon contractual claims are property which cannot be extinguished without due process of law. *Louisiana ex rel. Folsam v. Meyer of New Orleans* 109 U.S.

285, 291 (1883) (Bradley, J. concurring); *Fontana v. Barham*, 707 F.2d 221, 226 (5th Cir. 1983); *Evans v. City of Chicago*, 522 F. Supp. 789, 796 (N.D. Ill. 1980). Thus, Petitioner's cause of action against Harvester and the jury's verdict against Harvester were both property protected by the due process clause. Petitioner was denied these property rights by virtue of the Court of Appeals' decision requiring entry of judgment for Harvester.

The question then becomes whether, under the circumstances, Petitioner was accorded the process she was due in connection with these rights. *Board of Regents v. Roth*, 408 U.S. 564 (1972). While due process cannot be precisely defined, it expresses a requirement of fundamental fairness. *Lassiter v. Department of*

Social Services, 452 U.S. 18, 24-25 (1981). The fourteenth amendment was intended to insure that state judicial proceedings reflect this fundamental fairness. *Id.* at 33.

It has long been recognized that a state appellate court decision which is arbitrary and capricious or in clear conflict with principles of jurisprudence established to protect and enforce private rights constitutes a denial of due process of law. *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927); *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464 (1918). In addition, this Court has suggested that identifying what process is due in a particular situation requires consideration of several factors: (1) the private interest at stake; (2) the government's interest; and (3) the risk that the challenged procedure will lead to erroneous results and the pro

bable value of alternative procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

The private interest at stake here is undisputedly important. The right to seek compensation for tortious injury is fundamental to our system of justice. In contrast, the state would appear to have no legitimate interest in permitting appellate courts to arbitrarily disregard trial court verdicts. Prohibiting such conduct certainly imposes no additional fiscal or administrative burdens on the state. Finally, the risk that such determinations may be erroneous is significant. This Court has recognized both the importance of the right to cross-examine witnesses and the problems of making factual determinations on the basis of a "cold record." *United States v. Raddatz*, 447 U.S. 667, 679 (1980); *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Goldberg v. Kelly*, 397 U.S. 254,

269 (1970). Thus, fundamental fairness requires that the conclusions of a jury, or any other fact-finder, not be ignored or discounted upon review by an appellate court. *See, Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 114-15 (1963); *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 35 (1944).

These considerations are reflected in decisions of the Kentucky Supreme Court regarding the proper scope of appellate review. These decisions forbid an appellate court to discount the probative value of expert testimony, re-evaluate the credibility of witnesses, or substitute its judgment for that of the jury on factual issues. *Rogers v. Kasdan*, 612 S.W.2d 133, 135 (Ky. 1981); *Barrett v. Stephany*, 510 S.W.2d 524, 529 (Ky. 1974); *Roland v. Murray*, 239 S.W.2d 967, 969 (Ky.

1951). The Court of Appeals in this case clearly violated all of the above precepts of proper appellate review. The court selectively cited evidence supporting Harvester's position while selectively ignoring evidence that the design at issue was unsafe and defective. The court characterized evidence which the jury apparently found convincing as general and conclusory. The court discounted the testimony of one expert witness merely because he had testified in a prior case in which a verdict had been directed for the defendant.

Thus, the action of the Court of Appeals was far more than improper appellate practice. It was an arbitrary and unreasonable deprivation of Petitioner's property rights. Providing a party a complete evidentiary hearing is of little value in securing that party's rights if an appellate

court is free to reweigh, reconsider and selectively ignore the factual conclusions of the trial court or jury. Nor can credibility judgments be fairly made by an appellate tribunal. While this Court is admittedly not in a position to prescribe state appellate procedures, this Court can and should address those situations in which state appellate courts usurp the role of the finder of fact and thereby arbitrarily deny litigants their property rights without due process of law.

CONCLUSION

Petitioner's cause of action arising from her husband's fatal injuries constituted valuable property rights protected by the fourteenth amendment. The Court of Appeals' arbitrary reevaluation of the evidence adduced at trial was a clear departure from the fundamental fairness required by the due process clause.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 1984, I have mailed three copies of this petition, first class postage prepaid, to each of the following parties:

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83-1207

-A1-

No._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

LOU RAINES RIFFE, Administratrix
of the Estate of Don C. Riffe,
Petitioner,

v.

INTERNATIONAL HARVESTER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
KENTUCKY

APPENDIX

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SUPREME COURT OF KENTUCKY

83-SC-492-D
(82-CA-403-MR)

LOU RAINES RIFFE,
ADMINISTRATRIX OF THE
ESTATE OF DON C. RIFFE — MOVANT

v. MARTIN CIRCUIT COURT
#78-CI-197

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

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83-SC-507-D
(82-CA-403-MR)

INTERNATIONAL HARVESTER
COMPANY — MOVANT

v. MARTIN CIRCUIT COURT
#78-CI-197

PETER CAVE COAL COMPANY,
INC. AND WOLF CREEK
COLLIERIES, INC. — RESPONDENTS

ORDER DENYING MOTIONS FOR DISCRETIONARY REVIEW

The motions of Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe and International Harvester Company for a review of the decision of the Court of Appeals are denied.

The Court of Appeals' opinion is ordered not to be published.

ENTERED October 26, 1983.

_____

Chief Justice

OPNION RENDERED: June 3, 1983; 10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

82-CA-403-MR

INTERNATIONAL HARVESTER COMPANY — APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 78-CI-197

LOU RAINES RIFFE, Administratrix of the Estate of Don C. Riffe, Deceased; PETER CAVE COAL COMPANY, INC.; and WOLFE CREEK COLLIERIES, INC. — APPELLEES

REVERSING

* * * * * * * * * * *

BEFORE: HAYES, Chief Judge, HOWERTON, and PAXTON, Judges.

HOWERTON, JUDGE. International Harvester appeals from a judgment entered on a jury verdict in the Martin Circuit Court awarding Lou Raines Riffe, administratrix of the estate of Don Riffe, the sum of $2,103,835.00. The judgment prorated the award on the basis of sixty percent against International Harvester, five percent against Peter Cave Coal Co., and thirty-five percent against Wolf creek Collieries. Peter Cave Coal Co. and Wolf Creek Collieries filed separate appeals, but their appeals were dismissed on motion of International Harvester when the litigants failed to file their briefs and

perfect their appeals.

International Harvester alleges that the trial court erred in failing to grant its motion for a directed verdict, that the verdict was excessive, that the instructions were erroneous, and that the trial court erred in failing to grant its motion to alter, amend, or vacate the verdict. We agree that the trial court erred in denying the motion for a directed verdict, and we reverse the judgment as to International Harvester. We will discuss only the failure to grant the directed verdict.

Don Riffe died when the front end loader he was operating turned over and crushed him. His administratrix alleged that the equipment was defectively

designed in that it lacked a roll over protective structure (ROPS).

The testimony indicated that no company manufacturing end loaders at the time this equipment was built in January 1968 provided a ROPS. Harvester had been developing a ROPS since 1965, but it did not perfect a ROPS design for its end loaders until 1973. It was the first manufacturer in the industry to produce one. Harvester's witnesses testified that the development involved engineering problems regarding material strength, reliability, energy absorption capacity, and a modification of the vehicle's center of gravity. Attachment of the ROPS to an end loader also would reduce visibility and hinder a driver from jumping clear of the equipment in the event of an accident.

The evidence further indicated that there were some "after market" ROPS available in 1968, but the devices had not been proven reliable and were not specifically designed to fit this piece of equipment. There had been instances of accidents where the add-on ROPS had failed, causing even more metal to collapse around a driver.

In 1978, the Kentucky General Assembly enacted KRS 411.310(2) which reads:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at

the time the design was prepared, and the product was manufactured.

The statute provides the dispositive law in the case, and this action presents its first test and application. The statute creates a presumption that the end loader was not defective if "the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured." (Emphasis added.) The statute creates a presumption in favor of the manufacturer based on compliance with industry standards, even if those standards do not conform to the current state of the art. In II Frumer-Friedman, *Products Liability*, Sec. 16A[4] [i], p. 3B-176.2, (1980) we read:

Kentucky's Products Liability Act . . . creates a

rebuttable presumption that a product is not defective if its design, manufacture and testing standards conformed to either the state of the art in existence at the time the product was designed and manufactured or "generally recognized and prevailing standards" in the industry at that time. Thus, the Kentucky presumption is tied to an industry's acceptance of advances in the state of the art.

The Kentucky statute was passed after the trial in *Nichols v. Union Underwear Co., Inc.*, Ky., 602 S.W.2d 429 (1980). In *Nichols* the court stated that several factors, including deviation from an industry standard,

should be presented to the jury to determine whether a product is unreasonably dangerous. If the law *Nichols* established in products liability cases was the law in Kentucky, we would probably be compelled to uphold the trial court in its denial of a directed verdict and in its instructions. *Nichols* is not dispositive, however, because of the action taken by the legislature in adopting KRS 411.310(2).

The legislature's creation of the presumption reflects a concern for the rising tide of plaintiff's verdicts in defective design claims and is an attempt to define a standard of care to which a manufacturer may be held in products liability cases. Conformity with industry standards or the

state of the art should prevent one from being held liable for defective design, but if a preponderance of the evidence indicates that an industry has adopted careless standards, liability may be imposed. Once a manufacturer establishes the presumption of a non-defective design by specific proof of conformity with industry standards or the state of the art, a plaintiff can only overcome the presumption by a preponderance of the specific evidence to the contrary. Only then is there a question for a jury to decide. The legislature obviously did not intend to allow a jury to find a manufacturer liable after a plaintiff submitted only a minimum of general evidence.

International Harvester's evidence established that the design, method of manufacture, and testing of the end

loader conformed to the generally recognized and prevailing industry standards in 1968. The presumption that the design was not defective was, therefore, established. Riffe's efforts to rebut the presumption came from the testimony of two witnesses. The testimony, however, merely consisted of ultimate legal conclusions that the end loader was unreasonably dangerous and that the industry could have developed a ROPS by 1968. Neither witness gave any specifications for his theoretical ROPS design, nor did he give any specific facts which, presumably led to his opinion. We have carefully reviewed the testimony, and it does not meet, much less preponderate against, Harvester's specific evidence detailing why it had not yet produced a ROPS in 1968.

Riffe also argues that additional evidence existed indicating that California and the Corps of Engineers required ROPS on end loaders at the time in question. This evidence came from less than unequivocal statements by the witnesses and can scarcely be said to establish the "generally recognized and prevailing standards" in the industry. Both witnesses acknowledged that in 1968 there were no industry standards, no design, no method of manufacture, and no testing for ROPS in the entire heavy equipment industry.

Similar evidence was held "valueless" and "of the rankest speculation" in *Cox v. General Motors Corp.*, Ky., 514 S.W.2d 197 (1974). The court affirmed a directed

verdict for the automobile manufacturer. *See also, Ford Motor Co. v. McCamish*, Ky. App., 55 S.W.2d 507 (1977), and *Singleton v. International Harvester Co.*, 685 F.2d 112 (4th Cir. 1981). We note that one of Singleton's expert witnesses was also an expert witness for Riffe.

We can only conclude that KRS 411.310(2) creates a presumption that a manufacturer is not laible for defective design if his product generally conforms to industry standards or to the current state of the art in the development of such products. The evidence clearly showed that the end loader complied with industry standards at the time of its manufacture in 1968, and the testimony of Riffe's expert witnesses was insufficient to overcome the presumption and allow the case to be decided by a jury.

The trial court erred in denying International Harvester's motion for a directed verdict, and the judgment is reversed. The Martin Circuit Court is directed to enter a new judgment dismissing the claim against International Harvester.

ALL CONCUR.

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KENTUCKY REVISED STATUES 411.310(2)

(2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured. (Enact. Act 1978, ch. 91, Sec.3, effective June 17, 1978.)

SUPREME COURT OF KENTUCKY

NO. 83-SC-492-D

LOU RAINES RIFFE,
Administratrix of the
Estate of Don C. Riffe — Movant

vs. MOTION FOR DISCRETIONARY REVIEW

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

FILED

Jun 22, 1983

John C. Scott,
Clerk
Supreme Court

PETER PERLMAN
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I certify that a copy of this Motion was served upon the Resondent and the Clerk of the Court of Appeals by mailing a copy thereof to Charles Landrum, Jr., Esq., Suite 201, Security Trust Building, Lexington, Kentucky 40507; and Hon. John C. Scott, Clerk of the Kentucky Court of Appeals, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601; on this the 21st day of June, 1983.

PETER PERLMAN
ATTORNEY FOR MOVANT

SUPREME COURT OF KENTUCKY

No._____

LOU RAINES RIFFE,
Administratrix of the
Estate of DON C. RIFFE — MOVANT

vs. MOTION FOR DISCRETIONARY REVIEW

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

• • • • • • • • • • •

MAY IT PLEASE THE COURT

Comes the Movant, Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe, and respectfully moves the Court to review a decision rendered by the Kentucky Court of Appeals on June 3, 1983, which reversed a judgment of the Martin Circuit Court. (Appendix I).

a. The Movant is Lou Raines Riffe, Administratrix of

the Estate of Don C. Riffe, deceased, who is represented by Peter Perlman, Perlman & Garmer, P.S.C., 388 South Broadway, Lexington, Kentucky.

The Respondent is International Harvester Company, who is represented by Charles Landrum, Jr., Suite 201, Security Trust Building, Lexington, Kentucky.

b. The date of final disposition of this matter by the Kentucky Court of Appeals is June 3, 1983. (Appendix II).

c. A supersedeas bond was executed by the Respondent International Harvester Company after entry against it of a judgment by the trial court in accordance with a jury verdict.

I. INTRODUCTION

This is a products liability case arising out of the death of a 38-year-old coal mine equipment operator who was crushed by a front endloader manufactured in 1968 by the International Harvester Company. The Movant's theory was one of defective design by reason of the absence of a rollover protective structure (ROPS) on the endloader. The jury returned a verdict in Movant's behalf in the some of $2,103.835.

II. STATEMENT OF MATERIAL FACTS

A. Evidence Relating to the Occurrence

On February 8, 1978, Don Riffe was operating an International Harvester H-65C front endloader on a haulage road between the mining properties of the Peter

Cave Company and Wolfe Creek Collieries, in Martin County, Kentucky.

A witness saw the loader climb the haulage road with its bucket forward, and noticed that it suddenly came back down the hill, out of control, and off a bank on the left side of the road and turned over.

A biomechanical engineer, Dr. Vern L. Roberts, testified that the loader rolled only 3/4 of a turn, and that ROPS would prevent serious injury from a rollover of one full turn or less.

Earlier on the same day that Don Riffe was killed, other employees of Wolfe Creek and Peter Cave had experienced problems with the endloader's brakes and fuel. The brake pressure had failed and the engine was

"dying out." There was no evidence that Don Riffe was aware of these problems. The official cause of death was a "crushed chest."

Dr. Roberts and David MacCollum, a safety engineer, testified that Mr. Riffe would have survived the rollover if ROPS had been furnished. Mr. MacCollum concluded that "he would have walked away." Harvester's product integrity engineer, Roland F. Hughes, admitted that the environmental cab furnished as an integral part of the loader in place of the ROPS "wouldn't have supported anything in a rollover" and "the chance of somebody getting badly hurt or killed were good."

According to Mr. MacCollum, the front endloader's propensity to roll over had been recognized since the

1940's. This was the result of its large rubber tires, high center of gravity, and articulating feature.

Mr. Hughes testified that a ROPS unit serves two purposes:

(1) To inhibit rollover;

(2) To furnish operator protection.

Mr. Riffe's use of the loader conformed to its design and expected use. Harvester's expert, Mr. Hughes, felt that engine failure caused the loader to stop climbing and to lose its steering ability. He admitted that a rollover was foreseeable and in fact probable under the environment of its use. No expert witness disputed the known foreseeability of a rollover under similar conditions and no one attributed any negligent or improper conduct to Don Riffe. When a rollover occurs, the operator has no second chance without ROPS.

The evidence that it was best from a cost and technological standpoint to have ROPS installed by the manufacturer at the time of initial production was undisputed. The cost of a ROPS unit in 1968 was $1,000 to $2,000, as contrasted with the cost of the endloader of $60,000.00.

B. Evidence Relating to Availability of Rollover Protection (ROPS)

International Harvester advanced many theories in supoprt of its position that the judgment should be reversed. The only issue addressed by the Court of Appeals was its interpretation of KRS 411.310(2). It found

that the presumption in favor of the manufacturer had not been rebutted despite the jury and trial court's finding to the contrary.

At the trial, Harvester's expert engineer, Mr. Hughes, admitted that at the time this loader was manufactured, it was "generally knowledgeable throughout the industry that ROPS were available."

The following additional evidence was presented to the jury on this issue:

1. In 1968 and before, at least ten auxiliary equipment manufacturers were producing ROPS for use on front endloaders.

2. In 1968 and before, Harvester obtained ROPS units from auxiliary equipment manufacturers, incorporated these into their endloaders, and

thereafter sold the integrated unit at a profit as an International Harvester product. (Evidence presented through Roland Hughes, Harvester's engineer.)

3. In 1968 and before, there were some 33 different regulations requiring ROPS on front endloaders.

4. Before 1968, ROPS on all front endloaders were required by the state of California.

5. Before 1968, ROPS on all front endloaders were required by the U.S. Army Corps of Engineers.

6. Before 1968, ROPS on all front endloaders were required by the U.S. Bureau of Reclamation.

7. In 1958, the Portland, Oregon district of the North Division of the U.S. Army Corps of Engineers adopted a specification requiring ROPS on front endloaders. This was done after ROPS were field tested and found effective.

8. Harvester's recognition in the early 1960's of the need for ROPS was demonstrated by its "ROPS Compliance Guide" (1973):

> The rapidly growing need for ROPS was recognized by International Harvester in the early 1960's. Significant development work commenced in 1965, many years before ROPS were a legal requirement. (emphasis added)

9. Harvester had field tested ROPS for front endloaders for "many years" before 1968 but didn't attch them as part of basic design because they were unable to develop one that was adequate to "do the job." (Evidence presented through Roland Hughes.) "The job" referred to would be operator protection. Their design decision was to off no operator protection.

10. Before 1968, Harvester was aware of the regulations adopted by the U.S. Army Corps of Engineers requiring ROPS on front endloaders. (Evidence presented through Roland Hughes.)

11. In 1958, Harvester's predecessor, Frank G. Hough Co., developed a prototype assembly report for the attachment of an "overhead guard kit" on a front endloader. Its purpose was to prevent intrusion into the operator's zone of comfort. (Evidence presented through Roland Hughes.)

This evidence was characterized by the Court of Appeals as a "minimum of general evidence."

Less than two months before the trial, International Harvester submitted a "Pre-Trial Memorandum and

Brief in Support of Motion for Summary Judgment." In its Memorandum, Harvester stated "the technology of how to put a ROPS on an endloader was known, and was available to a customer by special order." This recognition by Harvester of the existing technology is a judicial admission. *Harlow v. Harlow*, 551 S.W.2d 230 (Ky. 1977).

In suport of its position, Harvester submitted the case of *Biss v. Tenneco*, 409 N.Y.S.2d 874 (1978), which it suggested fit this case "like a screen door." In the *Biss* case, it was found that the manufacturer had fulfilled its duty when it advised the purchaser that ROPS were available. The decision turned on the "election" of the purchaser to obtain the ROPS unit as an available option.

Various catalogues and sales brochures issued by Harvester in 1968 and before were introduced by Plaintiff and showed that no reference was made in any document to the availability of a ROPS unit as an option, accessory, or special order. This evidence was presented in response to Harvester's claim that the purchaser had "elected" to buy a loader without ROPS. Following the presentation of this evidence, Harvester abandoned this argument.

Harvester introduced evidence that in 1968, there were some seven front endloader manufacturers, none of whom offered ROPS as an integral part of the loader. The fact that ROPS were ever furnished is due only to the mandate issued in 1974 by the federal government

requiring their use by coal mine operators. 30 C.F.R. Sec. 77.403(A). By coincidence, Harvester's ROPS design was perfected just in time to comply with this regulation and Harvester was quick to promote its leadership in ROPS development through its 1973 "Compliance Guide."

Despite its recognition of the need for ROPS on front endloaders, and its desire to minimize injuries in rollovers, Harvester is to this day producing and selling front endloaders without ROPS to foreign markets. Its decision is totally based on economics. If ROPS are not mandated, they are not furnished. (Evidence presented through Roland Hughes.)

Dr. Roberts' evidence explained the ROPS concept to the jury. It is "basically a steel cage that encloses the operator's compartment." He further testified:

It's usually made out of pipe and you have bars come up at each corner and they're tied together at the top and there are usually some additional braces at the top.

According to Dr. Roberts, the guideline for determining the structural integrity of a ROPS unit for this loader was the following:

A. Well, actually it's twice the weight of the vehicle but you want to have at least the weight of the vehicle so if it's sitting on its roof and the whole weight of the vehicle is pushing down on that ROPS you won't have any crushing, you won't have the crushing action and pinning the individual between the machine and the ground.

Q. 71. I believe that Mr. Hughes in his deposition estimated the weight of this vehicle at twenty six thousand pounds, so what would be the structural integrity

of a properly designed ROPS unit?

A. About fifty thousand pounds.

Q. 72. Who is in a better position to furnish a rollover protective structure?

A. It's my opinion, Mr. Perlman that the manufacturer has the greatest amount of engineering work to design a ROPS. He's the man who knows what the vehicle can stand, he knows where he has his chassis, he knows the strength of his machine, or he should and he, in my opinion, is the individual who is in the best position to design a rollover protective structure that's best suited to his machine.

The following testimony was developed by Harvester's counsel upon cross-examination of Dr. Roberts:

Q. 9. As a safety engineer would you agree that the use of an improper design or inadequate ROPS may create a greater hazard to the operator?

A. I don't think there could have been any greater hazard than what he [Don Riffe) had. A ROPS which might not be strong enough would inevitably have to be stronger than that cab.

In addition, Dr. Roberts and Mr. MacCollum, testified that ROPS on front endloaders were known, available, and actually in use before 1968 without significantly affecting either the cost or function; that the manufacturer was in the best position to equip the front end-loader with a ROPS unit; and the technology was well-known at that time to do so. Not even Harvester questioned this evidence.

III. QUESTIONS OF LAW INVOLVED

A. WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED KENTUCKY'S PRODUCT LIABILITY ACT.

1. Interpretation of KRS 411.310(2)

The Court of Appeals' decision is the first appellate opinion interpreting Kentucky's Product Liability Act, KRS 411.300, *et seq.* Specifically, the Court of Appeals dealt with the application of KRS 411.310(2) which provides:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

The position taken by the Court of Appeals was:

> The statute creates a presumption in favor of the manufacturer based on compliance with industry standards, *even if* those standards *do not* conform to the current state of the art. (emphasis added)

(Opinion, p. 3-4)

This is contrary on its face to the express language of the statute which allows the presumption to be overcome by a preponderance of evidence showing that the product failed to comply *either* with:

a) Prevailing standards, *or*

b) The "state of the art."

Under the Court of Appeals' interpretation, a manufacturer is relieved by simply showing it complied with industry practice or standards *even if* such standards *do not conform* to the current "state of the art."

Such a narrow interpretation allows an industry to set its own safety standards, and abandons the power of the courts and legislature to regulate and control consumer safety. This represents a complete and total departure from previous law in Kentucky as represented by the case of *Herme v. Tway Co.*, Ky. 294 S.W.2d 534 (1956); *Jones v. Hutchinson Mfg.*, Ky. 502 S.W.2d 66 (1973); and *Nichols v. Union Underwear Co.*, 602 S.W 2d 429 (Ky., 1980).

In *Nichols*, the Kentucky Supreme Court held that the ultimate issue for the jury in a design case is:

> Whether the manufacturer that placed in commerce the product made according to an intended design acted prudently.

Id., at 33.

2. *Definition of "State of the Art"* Both *Jones* and *Herme, supra*, held that conformity with industry

practice does not establish compliance with the "state of the art" and will not shield a manufacturer from liability.

In *Nichols, supra,* it was shown that the t-shirt in question complied with applicable standards for flammability. The Court held that this was only one of the factors to be considered by a jury in determining whether the product was unreasonably dangerous. The following observation was expressed by Justice Stephens in the *Nichols* opinion:

> Probably the main difference between design defects and construction flaws is that with respect to design defects the feasibility of making a safer product is usually in issue, while feasibility is not generally an issue for construction flaws.

Id., at 433.

Harvester's claim is that it complied with industry standards. In fact, there were no industry standards. Had it made any effort to design a protective structure for a foreseeable rollover, it might be appropriate then to view their design in comparison with an alternative. However, their conscious choice was to make no design at all. In *Nichols, supra,* the Kentucky Supreme Court applied a risk-balancing test to determine the defective nature of a product. Under this test, consideration is given to technologically and economically available and feasible methods of producing the product in a safer fashion. One of the factors considered is industry practice, and another is "state of the art." This is consistent with the presumption in KRS 411.310(2).

"State of the art" has been defined in the following manner:

> The technological environment at the time of manufacture. This technological environment includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured.

Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980).

Mere compliance with industry practice is not *equivalent* to compliance with the "state of the art." To hold otherwise would allow a handful of manufacturers to ignore known and available safety measures. Certainly this cannot be the law in Kentucky.

Consistency with industry practices has never been conclusive in either strict liability or negligence actions.

Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1932); Phillips, "The Standard for Determining Defectiveness in Products Liability," 46 U.Cinn. L.Rev. 101 (1977).

In the *T.J. Hooper* case, *supra*, Judge Learned Hand addressed industry custom, and stated:

> A whole calling may have unduly lagged in the adoption of safety devices . . . Courts must in the end say what is required.

In this case, as in *Hooper, supra*, a handful of manufacturers unilaterally decided to withhold a protective measure from the public.

The Court of Appeals' opinion admits that its interpretation is contrary to the law as expressed in the *Nichols* case. It justifies its decision by announcing that

Nichols is no longer dispositive and was pre-empted by KRS 411.310(2).

The Court of Appeals misapplied and misinterpreting both the Court's holding in the *Nichols* case and KRS 411.310(2). Reversal by the Supreme Court is essential.

B. WHETHER THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OPINION FOR THE JURY'S FINDINGS OF FACT.

The Court of Appeals specifically found that the trial court erred in denying Harvester's motion for a directed verdict. In so doing, the Court of Appeals overlooked the well-established principle of law that a reviewing court must view the evidence in the light most favorable to the party for whom the jury has found, and to give that party the benefit of all reasonable inferences from the evidence. In addition, the reviewing court must accept the evidence of plaintiff's witnesses as true for purposes

of this motion. *Cassinelli v. Begley*, Ky., 433 S.W.2d 651 (1968); *Peterman v. Darby*, Ky., 419 S.W.2d 747 (1967).

In summarizing the evidence, the Court of Appeals reviewed it in a light most favorable to the manufacturer, and virtually ignored plaintiff's proof. Rather than looking for consistency between the jury's verdict and the evidence as presented, the Court of Appeals decided to toally disregard such evidence.

The Court of Appeals' opinion does not even mention:

1. The admission by Harvester's engineer that in 1968 the availability of ROPS was "generally knowledgeable throughout the industry";

2. The fact that Harvester obtained ROPS units in 1968 and installed them on its own front endloaders;

3. Harvester's compliance guide which recognized the growing need for ROPS by Harvester in the early 1960's;

4. Harvester's admission that it had tested ROPS for front endloaders for many years before 1968.

The Court of Appeals rejects the evidence that the state of California and the U.S. Army Corps of Engineers required ROPS on all front endloaders because in the Court's view such evidence "came from less than unequivocal statements."

It acknowledges the evidence relating to the availability of "after-market" ROPS in 1968, but accepts Harvester's partisan view that such devices had not been proven reliable. The Court of Appeals makes reference to "instances of accidents where the add-on ROPS had failed." This demonstrates an additional reason that ROPS should have been included by the manufacturer as an integral part of basic design.

Similar evidence as that rejected by the Court of Appeals was considered by the Supreme Court of Alaska in the case of *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871

(Alaska 1979) which involved a front endloader, and facts very similar to the present case. In *Beck*, the Court dealt with a 1964 front endloader as compared to the 1968 loader in this case.

The Alaska Supreme Court discusses the 1960 regulation of the U.S. Army Corps of Engineers and the 1965 regulation of the state of California, and the availability of ROPS from auxiliary equipment manufacturers. The Court had no difficulty in concluding that this evidence supported a finding that the endloader was defective in design by reason of the absence of ROPS.

The Alaska court found that *ROPS were available, feasible,* and *cost effective* in the 1950's, and at the time of the design (late 1950's) and production (1964) of the front endloader, and that the manufacturer "made a *deliberate*

decision not to install any kind of protective canopy whatsoever on the 944 as part of its basic design." The manufacturer (Caterpillar) in *Beck*, made the same argument that Harvester makes in this case and the Court disposed of this argument in the following manner:

> Comparison with similar products . . . would be improper if used as the definitive test for ascertaining a defect.

Id., at 881.

The same evidence was also presented in *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981) which concerned a rollover at a strip mine of a DH8 tractor manufactured in 1970. ROPS were not furnished as part of basic design. The Alabama Supreme Court considered the evidence which included the regulations of the U.S. Army Corps of Engineers and the state of California which required ROPS on heavy equipment (including front endloaders). The Court concluded:

> The jury could have found under the evidence that the state of the art at the time the tractor here was sold dictated the inclusion of some type of rollover device.

Ford at 858

Alabama's wrongful death statute allows damages in such amount as will punish the tortfeasor and "deter him and others." The evidence was found sufficient to support an award under this statute.

Kentucky's Court of Appeals found that the same evidence did not create an issue of fact for the jury. This finding is clearly erroneous and should be set aside.

In its opinion, the Kentucky Court of Appeals does not even attempt to distinguish either the *Beck*, or *Ford* case. Instead, it chose to accept the authority submitted by

by Harvester, *Singleton v. International Harvester Co.*, 685 F.2d 112 (4th Cir. 1981). As an aside, the Court of Appeals notes that one of Singleton's experts was also an expert witness for Riffe.

In Singleton, a 1948 farm tractor rolled into a muddy spot, became immobilized, and flipped over. There is no similarity in either the facts or the product between the present case and the *Singleton* case. Some of the basic differences between a front endloader and a tractor include the loader's articulation feature, its ability to jackknife and roll over, its use on hills, its large tires and high center of gravity, and its multi-purpose uses. The Court found that there was a failure to show a safer tractor design that was available in 1948.

The evidence should have been viewed in its most favorable light and from the perspective of whether it

would have been unreasonable for the jury to find for the Plaintiff. *Perkins v. Trailco Mfg. Sales*, Ky., 613 S.W.2d 855 (1981). Instead, the Court of Appeals scrutinized and criticized the quality of proof and seemed intent on finding a reason to reverse the verdict.

A recent Sixth Circuit opinion applying Kentucky law discussed the responsibility of the trial judge in considering a Motion for Judgment N.O.V. *Pike v. Benchmaster Mfg. Co.* (decided Dec. 17, 1982, No. 80-5473) (6th Cir. 1982).

The Court stated:

> Thus, if there is sufficient evidence to raise a question of fact for the jury, JNOV is improper. In determining whether the evidence is sufficient, the trial court may neither weight the evidence, pass on the credibility of

witnesses nor substitute its judgment for that of the jury. In deciding the motion, the trial court must view the evidence in a light most favorable to the part against whom the motion is made, drawing from that evidence all reasonable inferences in its favor.

In contrast, the Court of Appeals weighed the evidence, passed on the credibility of witnesses, and substituted its judgment for that of the jury.

C. WHETHER THE COURT OF APPEALS' OPINION ENCOURAGES MISDESIGN IN DEFECTIVE DESIGN CASES.

The Court of Appeals' opinion makes the following policy statement about defective design claims:

The legislature's creation of the presumption reflects a concern for the rising tide of plaintiff's verdicts in defective design claims.

(Opinion, p. 4)

Although no documentation is furnished in support of such a "rising tide," the Court's opinion is an obvious attempt to stem such litigation, now and in the future.

Such an approach totally frustrates the purposes upon which strict liability as expressed by Restatement Section 402 (A) was conceived. These purposes include placing the risk of injury on the person or corporation:

1) Who puts a product in the stream of commerce;

2) Who is most able to distribute the cost;

3) Who is in the best position to perceive, appreciate and avoid the product's danger; and

4) Who is or ought to be aware of the real cost of the product and viable alternatives.

These goals have been recognized in Kentucky. *Embs v. Pepsi Cola Bottling Co. of Lexington*, Ky., 528 S.W.2d 703 (1975).

Don Riffe had nothing to do with the design, sale or distribution of the product; he was neither contributorily negligent, nor did he appreciate any risks in connection with the use of the product. Harvester and the Court of Appeals would have him and his estate suffer the entire burden.

In the recent case of *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568 (Ohio 1981), Ohio's Supreme Court discussed the evolution of the strict liability concept:

> The doctrine of strict liability evolved to place liability on the party primarily responsibile for the injury occurring, that is, the manufacturer of the defective product.

Greenman v. Yuba Power Products, Inc. (1963), 59 Ca.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897. Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm.

As the Court observed in *Nichols, supra,* in design defect cases, the defect is an unreasonably dangerous design; actual knowledge is not the question. The design of the front endloader was defective and unreasonably dangerous. The jury heard the evidence and so found. The trial court agreed with the jury verdict. To reverse

such a finding would be a gross abuse of discretion and would invite the misdesign of products with little or no regard for their injury potential. Hopefully, this is not the law in Kentucky.

IV. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED AND REVERSED FOR THE FOLLOWING REASONS.

1. The Court improperly interpreted Kentucky's Product Liability Act and reached a result totally inconsistent with the Kentucky law of Product Liability;

2. The Court improperly interpreted, distinguished, and overruled *Nichols v. Union Underwear;*

3. The Court of Appeals improperly substituted its opinion for the jury's finding of fact;

4. The court set a precedent which is consistent with harsh and irrational results and encourages the misdesign of products;

5. The Court's Opinion violates the fundamental purposes and goals of strict liability.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals is erroneous and unjust. Movant respectfully moves the Court to exercise its power of discretionary review and to right the wrongs which have been committed.

Respectfully Submitted,

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NO. 83-1207

IN THE

Supreme Court Of The United States

October Term 1983

LOU RAINES RIFFE, Administratrix
of the Estate of Don C. Riffe
Petitioner,

v.

INTERNATIONAL HARVESTER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

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Supreme Court Of The United States

OCTOBER TERM, 1983

NO. 83-1207

LOU RAINES RIFFE, Administratrix of the Estate of Don C. Riffe — PETITIONER

VS:

INTERNATIONAL HARVESTER COMPANY — RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, International Harvester Company,[1] offers this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Kentucky.

I. INTRODUCTION

This is a products liability action which was brought in the Martin Circuit Court of the Commonwealth of Kentucky under state law alleging that International Harvester Company was responsible for

[1] International Harvester Company is an independent publicly held corporation. Its subsidiaries are wholly owned, and it is not affiliated with any other domestic corporation.

the death of the Petitioner's decedent and is liable in damages to her. The case was prosecuted and tried under the procedural and substantive laws of Kentucky. A judgment upon a jury verdict was entered against International Harvester Company.

International Harvester Company appealed this judgment to the Court of Appeals of Kentucky. The Court of Appeals determined the Petitioner had not met her burden of proof under the Kentucky Product Liability Act, Ky. Rev. Stat. §§ 411.300, *et seq.* and ruled that the Circuit Court should have granted International Harvester Company's motion for a directed verdict. The trial court was directed to enter a new judgment dismissing the complaint against Harvester. The text of the Court of Appeals opinion was included in the Appendix to the Petition for Writ of Certiorari at pages A-5 through A-18.

The Petitioner filed a motion for discretionary review in the Supreme Court of Kentucky. (This motion is included in Petitioner's Appendix at pages A-20 through A-61.) As required by Ky. R. Civ. P. 76.20(3)(d), the Petitioner set out expressly the issues she sought to have reviewed by the Supreme Court of Kentucky. They were as follows:

> (a) Whether the Court of Appeals properly interpreted Kentucky's Product Liability Act (Petitioner's Appendix, p. A-40);
>
> (b) Whether the Court of Appeals improperly substituted its opinion for the jury's finding of fact (Petitioner's Appendix, p. A-47);

(c) Whether the Court of Appeals' opinion encourages misdesign in defective design cases (Petitioner's Appendix, p. A-55).

The Supreme Court of Kentucky denied the motion for discretionary review on October 26, 1983. Petitioner's Appendix A-3 through A-4.

II. THE FEDERAL QUESTION WHICH THE PETITIONER NOW SEEKS TO RAISE WAS NEITHER PRESENTED TO NOR DECIDED BY THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY.

It is the Court of Appeals of Kentucky itself which the Petitioner alleges violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Therefore, the federal claim had to have been presented in the motion for discretionary review, if at all.[2] But it is not found there. *See* Petitioner's Appendix, pp. A-20-A-61.

[2]The Supreme Court of Kentucky Rules of Practice provide that a denial of a motion for discretionary review is final disposition of the matter. Ky. R. Civ. P. 76.20(e) states in part: "A ruling by the Supreme Court granting or denying a motion for discretionary review will not be reconsidered by the Supreme Court." Evidently recognizing she had not presented any reviewable federal question, on November 22, 1983 the Petitioner attempted to file a Petition for Rehearing outside the procedural rules, alleging a violation of due process of law by the Court of Appeals. This petition was treated as a motion for leave to file a petition for rehearing and was denied on December 16, 1983 by the Supreme Court of Kentucky.

The Rules of the United States Supreme Court make clear that the history of the federal issue is to be presented lucidly in the Petition for Writ of Certiorari. Sup. Ct. R. 21.1(h) directs that the Statement of the Case in the Petition for Writ of Certiorari "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court; . . ." The rule also requires appropriate excerpts of the record to assist the Court in determining at the outset whether a federal question was presented and decided by the state court such as would give the United States Supreme Court jurisdiction to hear this matter.

The Petitioner was content in her Petition for Writ of Certiorari to maintain that her argument in her motion for discretionary review below that the Court of Appeals of Kentucky improperly substituted its opinion for the jury's findings of fact "clearly raised the contention that the Court of Appeals' action constituted a denial of Petitioner's due process rights." Petition for Writ of Certiorari at 6. Frankly, it would have taken a douser and his divining rod to have found the federal issue in that ground for review by the Supreme Court of Kentucky.

The Petitioner did not comply with Sup. Ct. R. 21.1(h) because the federal claim was not presented nor was it decided by the Supreme Court of Kentucky.

The Petitioner does not relate the "method or manner of raising" the federal issue nor the "way [it was] passed upon by the federal court" simply because no federal claim was introduced or considered in this case. This case arose under and was decided upon state law principles solely. The Petitioner first thought about a federal issue only after the Supreme Court of Kentucky denied the motion for discretionary review.

The Respondent submits this case is controlled by *Webb.* v. *Webb*, 451 U.S. 493 (1981). The federal issue presented similarly was obscured from the state court in that case. This Court made an observation pertinent to the case at bar:

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Id. at 495-96, *quoting Street* v. *New York*, 394 U.S. 576, 582 (1969).

In the absence of an express consideration of the federal issue by the state court, this Court will

presume the federal question was not properly presented below.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. *Webb*, *supra* at 496-97.

In the final analysis, the principles of comity respected in our system of federalism put great emphasis on giving the State Court the first opportunity to pass on any federal issue supposedly embraced in a case:

> At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. *Webb*, *supra* at 501 (emphasis by the Court).

The Bill of Rights of the Constitution of Kentucky treats trial by jury as a right "held sacred . . . and inviolate." Ky. Const. §§ 7. Our Constitution guarantees all persons, individual and corporate, access to Kentucky Courts and "remedy by due course of law . . . ." Ky. Const. §§ 14. With full knowledge of these Constitutional provisions, the Petitioner at no time asserted she had been deprived wrongfully of her rights. The Court of Appeals and the Supreme Court of Kentucky were cognizant of their duty to insure that both the Petitioner and Respondent received all rights and benefits due in this litigation. The ruling of the Supreme Court of Kentucky *is* the result of the "due course of law." Only after receiving a result unsatisfactory to her does she now seek to advance a "due process of law" argument.

Finally, Petitioner refers to *Bose Corp.* v. *Consumers Union of the United States, Inc.*, No. 82-1246 as support for her petition. But that case concerns questions of appellate review of trial court findings of "actual malice" such as would remove First Amendment protection from printed magazine articles. It does not concern state appellate review of state causes of action for sufficiency of evidence.

The Supreme Court of Kentucky was not given the opportunity nor asked to determine the federal question the Petitioner now advances. The Petition should be denied.

III. THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY IS FOUNDED UPON INDEPENDENT STATE GROUNDS.

As was noted in Section 2, *supra*, the jurisdiction of the United States Supreme Court to review decisions of the highest court of a state is limited. "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945). In cases which concern the adjudication of rights under state law, state law supplies the rules of decision. 28 U.S.C. § 1652. Additionally, "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. at 125. This case was decided by the state courts under state law, and therefore is not subject to review on writ of certiorari.

The Petitioner asserted in her Petition for Writ of Certiorari that the Kentucky Product Liability Act, Ky. Rev. Stat. § 411.300, *et seq.* was not at issue in this Petition. Petition for Writ of Certiorari at *vii.* However, that was not her position below. In her motion for discretionary review by the Supreme Court of Kentucky, the primary question of law advanced was "whether the Court of Appeals properly interpreted Kentucky's Product Liability Act." Petitioner's Appendix page A-40.

An examination of the opinion of the Court of Appeals of Kentucky discloses that its decision was

based solely upon the interpretation of this state statute and the Petitioner's failure to present evidence sufficient to make out a jury issue under the provisions of that statute. *International Harvester Company* v. *Riffe*, No. 82-CA-403-MR, Slip. Op. (June 3, 1983) (Petitioner's Appendix at A-5 through A-18).

The United States Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law, ..." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). By definition this principle includes the determination of whether a party has met the burden of proof set out under the state law:

> The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts.

American Radio Association, AFL-CIO v. *Mobile Steamship Association, Inc.*, 419 U.S. 215, 231 (1974).

Kentucky's Product Liability Act sets out in Ky. Rev. Stat. § 411.310 certain standards of proof and statutory presumptions which the General Assembly of Kentucky has determined must be met before a product can be considered "unreasonably dangerous" in an action tried under Kentucky law. The Court of Appeals of Kentucky reviewed the evidence presented by the Petitioner at her trial and determined that the evidence submitted was insufficient to rebut the presumption of that statute. The Supreme Court of

Kentucky declined to review the decision of the Court of Appeals. Now the Petitioner complains that the evaluation of her evidence in light of the procedural and substantive rules of the Commonwealth of Kentucky is a violation of due process of law.

However, her argument ignores the standards set out frequently by this Court, even in the case cited by the Petitioner as support for her argument. *Logan* v. *Zimmerman Brush Company*, _____ U.S. _____, 102 S. Ct. 1148, 1158 (1982) states:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitation, or, in an appropriate case filing fees, and the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. (emphasis by the Court).

It long has been a rule of law of the Commonwealth of Kentucky that "[a] reviewing court has the power to set aside a verdict on the ground that it is not sufficiently supported by the evidence." *Commonwealth, Department of Highways* v. *Dillon*, 525 S.W.2d 658, 659 (Ky. 1975); *Higgans* v. *Deskins*, 263 S.W.2d 108 (Ky. 1953). The Petitioner does not complain that she was not accorded a procedure or benefit of substantive law otherwise provided to litigants in the Commonwealth of Kentucky. Frankly, her complaint is that her presentation of evidence was adjudged insufficient.

This is an application of state law by a state court to a state cause of action, and it is controlling in the Supreme Court of the United States. *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960), *see Exxon Corporation* v. *Eagerton*, _____ U.S. _____, 103 S. Ct. 2296, 2301 fn. 3 (1983).

CONCLUSION

In the final analysis, the Petitioner was accorded due process of law at all stages in this ligitation. There is no violation of any federal right. There was no federal question presented below which was decided by the state court and which is present for review by the United States Supreme Court on Writ of Certiorari. The decisions of the Kentucky courts rest upon Kentucky law only.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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